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HAROLD B. WILLEY, C

Supreme Court of the United States

October Term, 1955

No. 420

HARRY C. STEIGMAN EQUIPMENT CO.,
a corporation of New York,

vs.

ATLANTIC HOTEL COMPANY,
a corporation of New Jersey.

LEWIS S. JACOBSON, *Petitioner,*

v.

ANGELO D. MALANDRA, *Receiver.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons Relied on for Allowance of the Writ	5
Conclusion	17
Appendix	1a

Cases Cited

American Pin Co. v. Wright, 60 N. J. Eq. 147, 46 A. 215 (Ch. 1900), affirmed 85 N. J. Eq. 219, 98 A. 1084 (E. & A. 1901) 15

Bacon v. Bonham, 33 N. J. Eq. 614 (E. & A. 1881) .. 15

Bergman v. Buechler, 249 App. Div. 553, 292 N. Y. S. 882 (1937) 8

Bigelow v. Old Dominion Copper, &c., Co., 74 N. J. Eq. 457 (Ch. 1908) 15

Cogan v. Conover Mfg. Co., 69 N. J. Eq. 358, 60 A. 408 (Ch. 1905), reversed, 69 N. J. Eq. 809, 64 A. 973 (E. & A. 1906) 16

Fidelity Union Trust Co. v. Reeves, 96 N. J. Eq. 490 (Ch. 1924), affirmed 98 Id. 412 (E. & A. 1925) ..13, 14, 15

Field v. Mayor of N. Y., 2 Seld. (6 N. Y.) 179 (N. Y. Ct. of App. 1852) 15

Hauselt v. Harrison, 105 U. S. 401 (1881) 15

Hurley v. Atchison, Topeka & Santa Fe Ry., 213 U. S. 126 (1908) 9

PAGE

Kennison v. Kanzler, 4 F. 2d 315 (6th Cir. 1925) 10

Macauley, In re, 158 F. 322 (D. C., E. D. Mich., 1907) . 15

Martindell v. Fiduciary Counsel, 133 N. J. Eq. 408, 30 A. 2d 281 (E. & A. 1943) 15

McFarland v. Stanton Manuf'g Co., 53 N. J. Eq. 649, 33 A. 962 (E. & A. 1896) 15

Mortgage Loan Co. v. Livingston, 45 F. 2d 28 (8th Cir. 1930) 9

Myers v. Forest Hill Gardens, 103 N. J. Eq. 1, 141 A. 808 (Ch. 1928), affirmed, 105 N. J. Eq. 584, 147 A. 911 (E. & A. 1929) 16

Powell v. Maryland Trust Co., 125 F. 2d 260 (4th Cir. 1942); certiorari denied, 316 U. S. 671 11

Receivers v. The Paterson Gas Light Company, 23 N. J. Law, 283 (S. C. 1852) 10

Smithurst v. Edmunds, 14 N. J. Eq. 408 (Ch. 1862) .. 14

Stanton v. Metropolitan Lumber Co., 107 N. J. Eq. 345, 152 A. 653 (Ch. 1930) 9

State, N. J. S. R. R. Co., pros. v. Railroad Commissioners, 41 N. J. Law, 235 (S. C. 1879) 11

Stokley Bros. & Co., Inc. v. Conklin, 131 N. J. Eq. 552 (Ch. 1942) 16

Terney v. Wilson, 45 N. J. Law, 282 (S. C. 1883) 15

Torrington v. Sidway-Topliff Co., 70 F. 2d 949 (7th Cir. 1934) 11

Union Trust Co. v. Bulkeley, 150 F. 510 (6th Cir. 1907) 15

Statutes and Miscellaneous

	PAGE
28 U. S. C. sec. 1254(1)	2
Rule 19, par. 1, of the Supreme Court of the United States	5
Rule 21, par. 4, of the Supreme Court of the United States	2fn
Rule 23, par. 1(i), of the Supreme Court of the United States	2fn
Rule 1:10-2(a) of the Revised Rules of the Supreme Court of New Jersey	5
Restatement, Contracts, Par. 154(2)	16

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Lewis S. Jacobson, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, rendered on August 11, 1955, which affirmed a judgment of the United States District Court for the District of New Jersey, denying to your petitioner the status of a prior and secured creditor.

Opinions Below

The opinion of the District Court is not reported, but is printed in the Record (R. 84).*

The opinion of the Court of Appeals is not yet reported, but is printed in the Appendix hereto (A. 1a).*

Jurisdiction

The judgment of the Court of Appeals is dated and was entered August 11, 1955.

On August 22, 1955, the Court of Appeals, by order, stayed the issuance of the mandate until September 26, 1955, in accordance with Rule 36 (2) of the Court of Appeals, pending the filing of this petition for certiorari.

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. sec. 1254(1).

Questions Presented

1. Under the law of New Jersey, will an assignment of assets not in actual or potential existence, for a valuable consideration, be given effect and enforced in equity where such assets are subsequently brought into existence?

2. Was the security of the assignment to your petitioner comprehensive enough, under the express terms of the assignment, to include any future moneys received by or on behalf of the debtor from any source whatever?

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* Page references to the Record ("R.") refer to the Appendix filed with the Appellant's Brief in the Court of Appeals. Page references to the Appendix ("A.") refer to the Appendix annexed to this petition.

Pursuant to Rule 21, paragraph 4, of the Rules of this Court, nine additional copies of the record as printed in the Court of Appeals have been filed with the Clerk of this Court for consideration by this Court. Accordingly, pursuant to Rule 23, paragraph 1(i), of the Rules of this Court, the Appendix to this petition is limited in content to the Opinion and Judgment of the Court of Appeals.

3. Was not the security of the assignment to your petitioner, by virtue of its broad language, enforceable against, not only the proceeds of the Receiver's net collections by virtue of his continued operation of the debtor's hotel business, but also the proceeds of, and the funds represented by the consideration paid by the purchaser of the hotel for, surrender of the lease and transfer of the capital assets?

4. Was the assignment ineffective by reason of extreme generality of the subject-matter assigned?

Constitutional and Statutory Provisions Involved

None.

Statement of the Case

The original action brought in the District Court, of which the present controversy is an offshoot, was a proceeding for and in equity receivership, the basis of federal jurisdiction being diversity of citizenship (R. 1).

On November 7, 1951, the defendant in the receivership action, Atlantic Hotel Company, a New Jersey corporation, hereinafter referred to as "Atlantic," entered into a lease agreement (R. 16) with the Indiana Boardwalk Corporation, hereinafter referred to as "Indiana," whereby Atlantic became the tenant of the Brighton Hotel property, hereinafter referred to as "the Brighton," in Atlantic City, from October 15, 1951 until December 31, 1961, for varying annual rentals.

During the winter 1951-52, Atlantic found its enterprise in such difficulty that it could not much longer finance day-to-day operations. During January and February, 1952, Atlantic borrowed from your petitioner to a total unpaid balance of $11,500 (R. 55 to 61), giving him its promissory note and a general assignment in the sum of $11,500 (Exhibit J-7, R. 61, 71; Exhibit J-8, R. 62, 71). By the latter instrument, Atlantic assigned to your petitioner

"all its right, title and interest in and to all the proceeds, funds, collections, cash and all income of the Atlantic Hotel Co. from any nature and source whatever."

The assignment contained also the following recital:

"This assignment is given to secure payment of $11,500, as evidenced by a promissory note of even date herewith, to secure all past and present indebtedness and unpaid balances and present loans."

On September 5, 1952, the plaintiff in the receivership action, Harry C. Steigman Equipment Co., a New York corporation, hereinafter referred to as "Steigman," brought the action against Atlantic as one of its creditors, and applied to the District Court for the appointment of a receiver (R. 1, 5). By an amendment to the complaint, a few days later, Steigman added your petitioner to the list of Atlantic's creditors (R. 11). A receiver was appointed (R. 7).

On October 2, 1952, Indiana submitted to the receiver an offer (R. 29) of $65,000 for, *inter alia,* a surrender of the possession of the premises, the cancellation of the lease and a transfer of the hotel personal property and liquor license. By order dated October 20, 1952 (R. 32), the receiver was authorized by the District Court to accept Indiana's offer.

Your petitioner's claim was disallowed as a preferred debt or priority claim, successively by the receiver (R. 47), by a court-appointed referee or master (R. 77), and, upon exceptions thereto (R. 98), by the District Court (R. 91).

Reasons Relied On for Allowance of the Writ

(Italics supplied, except where otherwise noted)

Reason No. 1. The Court of Appeals has decided an important state question not theretofore determined by the state courts, viz., whether an assignment of

> "all the proceeds, funds, collections, cash and all income (of Atlantic) from any nature and source whatever"

covers money realized by converting capital assets of the assignor into cash upon liquidation of the assignor's business by a receiver.

Your petitioner is painfully aware that the foregoing reason for allowance of certiorari does not squarely fit any of the reasons for such review that are set forth expressly in paragraph 1 of Rule 19 of this Court. The rule provides only one specific example of reviewability in a case where a court of appeals has decided a state question, viz. (in subparagraph b), where such decision is in *conflict* with applicable state law. Your petitioner, in the circumstances, is obliged, therefore, to draw by way of analogy and converse application upon the first of the two reasons indicted in subparagraph (a), viz., where a *state* court has decided a *federal* question of substance not theretofore determined by *this* Court.

But for the fortuity of diverse citizenship as a basis of original jurisdiction in the case at bar, your petitioner might, by now, have been knocking on the door of the Supreme Court of New Jersey. Under its rules governing certification, particularly R.R. 1:10-2(a), your petitioner, if unsuccessful in the Appellate Division of the Superior Court of New Jersey, would have been able to lean upon the express reason indicated in the New Jersey rule, viz., that the Appellate Division had decided a question of substance not theretofore determined by a court of last resort of New Jersey. Your petitioner, however, does not venture to asseverate in this Court that his escaping the need for ingenuity and resourcefulness in phrasing a reason for certification in the Supreme Court of New Jersey would have guaranteed his success in the proceeding.

The reasoning employed by the Court of Appeals in its opinion in the case at bar has complicated your petitioner's task in phrasing all three of his reasons for allowance of certiorari by this Court. We quote from the opinion (A. 3a-4a):

"In the view of the District Court the law of New Jersey would not recognize the 'assignment' to Jacobson as creating any equitable lien on the fund now in the receiver's hands because that fund came into existence after the assignment and was not the product of any contract or obligation existing at the time of the assignment. * * * But in our judgment the New Jersey case law on this point is *indecisive*. It also seems *unsettled* whether as a matter of commercial policy, New Jersey would regard the instrument here in suit as ineffective because of its extreme generality. * * *

"In any event, these are *important* questions of commercial law and creditors rights in New Jersey to which we find no *clear* answer. We prefer not to anticipate state decision of these questions. And in this case we think the judgment of the District Court is supportable on a ground which *avoids* these general questions of New Jersey law.

"Specifically, it is our conclusion that a proper construction of the 'assignment' of February 13, 1952 makes it inapplicable to the fund now in the hands of the receiver. The instrument as set out above purports to give Jacobson a security instrument in 'all the proceeds, funds, collections, cash and all income of the Atlantic Hotel Co.'* And, the next paragraph authorizes Jacobson to take whatever steps may be appropriate to reduce to possession 'any of the accounts, dues, debts and demands above assigned.'

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* This recital omits the immediately following language, viz., "from any nature and source whatever" (R. 71).

"This language was used in a situation where Atlantic was conducting an income producing business and money was being loaned by Jacobson for use in that business. Both the language used and the circumstances of its employment indicate that the parties were attempting to give Jacobson some security interest in present and prospective receipts and accounts receivable of the business as operated by Atlantic. The language is not apt to describe real or personal property constituting capital assets employed in the business. Nor is it apt to describe money which may subsequently be realized by the conversion of such assets into cash on the liquidation of the business. Nor is it apt to cover later operations of a receiver. We conclude, therefore, that as a matter of construction of language the fund now in question is not covered by the instrument of February 13, 1952."

Of course, if the Court of Appeals was correct in its construction of the assignment in the last paragraph above quoted, it properly refused to determine the otherwise unavoidable questions of whether the assignment was ineffective by reason of its extreme generality and whether the assignment would, in equity, attach to the proceeds of the sale by the receiver of the capital assets of Atlantic. The difficulty, however, is that the Court of Appeals undertook to resolve the substantive question of construction of the assignment as a matter of general law, without reference to or mention of any possibly applicable decisions in the New Jersey state courts on the question, and without even adverting to whether or not there were any such applicable decisions. This does not necessarily constitute error on the part of the Court of Appeals, and we are quick to support the (possible) tacit finding by the Court of Appeals of a lack of New Jersey court precedents on the precise question thus resolved below, by stating that our research has not upturned a New Jersey case in point; but the very absence of citations in the portion of the

opinion last above-quoted lends emphasis to the propriety of the exercise by this Court of its supervisory power in the premises, for Reason No. 1, as stated above.

If the Court of Appeals was incorrect in its construction of the assignment in the last paragraph of the above quotation from its opinion, then your petitioner is forced to confront this Court with reasons for certiorari which complain, not of a decision of the other state questions here involved, but of their nondecision, by the Court of Appeals. This posture of affairs explains the phrasing of Reasons No. 2 and 3, *infra*.

We now proceed to consider the meritorious question embraced in Reason No. 1. It is respectfully suggested that the Court of Appeals was in error in its construction of the applicability of the assignment. If the following language in the granting clause of the assignment,

> "all the proceeds, funds, collections, cash and all income * * * from any nature and source whatever,"

is not broad enough to cover the proceeds of sale by the receiver of the debtor's capital assets, then words have lost their meaning and express terminology in contracts among men may freely be ignored by the courts to which they submit their differences. It would be difficult to articulate more comprehensive words of coverage in a general assignment than those expressed in the foregoing quotation. In a New York statute, the word "income" was defined as

> "income however or whenever earned or acquired."

In *Bergman* v. *Buechler*, 249 App. Div. 553, 292 N. Y. S. 882, 884 (1937), the court, referring to that statutory definition, says:

> "* * * The language is broad and comprehensive and is clearly indicative of a legislative intention to include all moneys coming into the hands of the judgment debtors, whatever the source."

Even disregarding the phrase, "from any nature and source whatever," we still have the following deliberately-employed and independently-significant words, "proceeds," "funds," "collections," "cash," and "income." *Collections* resulting from the continued operation of the hotel by the receiver are collections of the hotel-company assignor. In *Mortgage Loan Co.* v. *Livingston,* 45 F. 2d 28, 32, the Eighth Circuit (1930) says:

> "* * * By carrying on the business of this hotel company through a receivership, the court assumed the burden of administering the property and collecting the income for the benefit of whomsoever was entitled thereto."

In *Stanton* v. *Metropolitan Lumber Co.,* 107 N. J. Eq. 345, 152 A. 653 (Ch. 1930), Vice Chancellor Backes held that $50,000 in rents collected by the receiver of an insolvent corporation, which rents accrued after the receiver's appointment, were held *in custodia legis, cum onere,* for the benefit of all legal claimants; that title to such rents was never in the receiver; and that he, having collected them, was accountable for them to an assignee of such rents.

By a parity of reasoning, the receiver in the case at bar is accountable also for the *proceeds* of all assets of the insolvent corporation which have been converted by him into money; including the consideration received by him for the surrender of the lease and demised premises. In *Hurley* v. *Atchison, Topeka & Santa Fe Ry.,* 213 U. S. 126 (1908), this Court held that equity looks at substance and not at form; that an advance payment for coal yet to be mined may be a pledge on the coal and, in that event, the trustee in bankruptcy takes the mine subject to the obligation to deliver the coal as mined, to the extent of the advancement. This Court says, on pages 134 and 135:

> "* * * The equitable rights of the parties were not changed by the commencement of bankruptcy proceed-

> ings. All obligations of a legal and equitable nature (135) remained undisturbed thereby. If there had been no bankruptcy proceedings the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement."

And so here. If, in the instant case, there had been no equity receivership proceedings, and Atlantic had settled its difficulties with Indiana by direct negotiation and conventional agreement, the *proceeds* of such agreement which were paid by Indiana to Atlantic would have been well within the terms of the security assignment by Atlantic to your petitioner. There would then have been no question as to your petitioner's right to be made whole from such *proceeds,* assuming that such *proceeds* were sufficient to pay in full all priority claims thereto, including your petitioner's. This Court should not lose sight of the fact that the consideration of $65,000 paid by Indiana to the receiver entitled Indiana to more than just a surrender of the leased premises and cancellation of the lease and security fund thereunder; Indiana was to receive also a transfer of the liquor license (R. 89) and a bill of sale (R. 36) of

> "all the furniture, furnishings and equipment of every nature and description then in said leased premises, including the inventory of Atlantic * * * as it existed on October 21, 1952; * * *."

"The rule is that a receiver takes the property which goes into his hands in the same plight and condition and subject to the same rights, equities and liens as it stood in the hands of the person or corporation out of whose possession it is taken." *Kennison* v. *Kanzler,* 4 F. 2d 315, 317 (6th Cir. 1925); *Receivers* v *The Paterson Gas Light Company,* 23 N. J. Law, 283, 289 (S. C. 1852). "The appointment of a receiver is a mere mode of procedure for the administration of justice. He is a mere custodian of the property, holding for the common benefit of all interested

therein. Placing the property of a corporation in charge of a receiver does not work its dissolution, nor is the title of the property changed; a power only is delegated to the receiver to take charge of it, and sell it." *State, N. J. S. R. R. Co., pros.* v. *Railroad Commissioners,* 41 N. J. Law, 235, 249 (S. C. 1879). "The property and funds of the insolvent debtor are in custodia legis, for the benefit of those to whom they rightfully belong." *Torrington* v. *Sidway-Topliff Co.,* 70 F. 2d 949, 955 (7th Cir. 1934). "The receivers hold the property, as officers of the court, just as the debtor held it, subject to any rights or equities which could have been asserted against him." *Powell* v. *Maryland Trust Co.,* 125 F. 2d 260, 272 (4th Cir. 1942); certiorari denied, 316 U. S. 671.

This brings us to the following statement in the opinion of the Court of Appeals in the present connection (A. 4a):

> "* * * Both the language used and the circumstances of its employment indicate that the parties were attempting to give Jacobson some security interest in present and prospective *receipts and accounts receivable* of the business as operated by Atlantic."

The parties, judging by the language of the assignment, were giving your petitioner a security interest in a lot more than merely the receipts and accounts receivable of the assignor's business. The fact, as also noted by the Court of Appeals just prior to the above-quoted sentence, that

> "money was being loaned by Jacobson for use in that business,"

cannot operate to restrain the language in the assignment, by which your petitioner was given a security interest in future funds of the assignor far exceeding and quite apart from collections of the hotel in the ordinary course of its business. This proposition is made adequately clear by the closing phrase,

> "from any nature and source whatever."

The purpose for which the proceeds of the loan were being used by the assignor cannot diminish the agreed breadth of the security interest given to the assignee.

Nor can such effect be derived from the language of the assignment whereby your petitioner, as also recited in the opinion of the Court of Appeals (A. 4a), was *authorized*

> "to take whatever steps may be appropriate to reduce to possession 'any of the accounts, dues, debts and demands above assigned.' "

The fact that your petitioner was thereby *authorized* to take such steps did not *oblige* him to do so before the assignor went into receivership. There was no time limit placed upon such authorization. Your petitioner may not, in conscience, be penalized for forbearance. After a receiver was appointed, your petitioner did take steps, the last of which—it is hoped—brings him here.

Nor can the words

> "any of the accounts, dues, debts and demands above assigned,"

as used in the authorization, detract from the granting clause in the assignment, whether by dint of comparative analysis or otherwise. Whatever may be said as to the restrictive meaning of the words "accounts" and "dues," the words "debts" and "demands" are broad enough to relate themselves to the terms of grant used in the assignment, and would cover any debt or demand accruing to the assignor or its receiver, including the consideration money arising from a sale of the assignor's capital assets. In any event, assuming that the power of attorney in the assignment covers less than the whole of the subject-matter assigned, no inconsistency can be said to exist which would impair the comprehensiveness of the assignment proper. That would be a case of the tail wagging the dog.

Reason No. 2. The Court of Appeals has improvidently left undecided an important state question which would most probably have been resolved in your petitioner's favor by the state courts, viz., whether an assignment of

> "all the proceeds, funds, collections, cash and all income (of Atlantic) from any nature and source whatever"

is ineffective by reason of extreme generality.

In its opinion (A. 4a), the Court of Appeals writes:

> "* * * It also seems unsettled whether as a matter of commercial policy, New Jersey would regard the instrument here in suit as ineffective because of its extreme generality. Cf. Fidelity Union Trust Co. v. Reeves, 1924, 96 N. J. Eq. 490, 125 A. 582; affirmed, 1925, 98 N. J. Eq. 412, 129 A. 922."

That question was left undecided by the Court of Appeals, because, as we have already seen, it ruled against your petitioner on another ground, viz., the one treated under Reason No. 1, *supra.* In *Fidelity Union Trust Co.* v. *Reeves,* 96 N. J. Eq. 490 (Ch. 1924), affirmed 98 Id. 412 (E. & A. 1925), cited in the foregoing quotation, an old lady became the inmate of a home, and signed an application agreeing to assign and set over to the home in a proper and legal manner any pension *or other property of which*

> "I may be seized or possessed, or may hereafter acquire."

She died possessed of an estate valued at $30,000, which *unexpectedly* came to her shortly before her death. The assignment was upheld by the equity court.

The assignment involved in the above-cited case provides a true illustration of extremely general language. If the assignment in the case at bar had been couched in similar terms, there might be plausible ground for misgivings on the part of a federal court as to whether, as a matter of commercial policy, thus far not discernibly

established by the state courts, the latter would consider the assignment effective in view of its generality. But the assignment at bar would appear to be in a safe zone with regard to commercial policy. All of its subject-matter is described in identifiable categories, i.e., "proceeds," "funds," "collections," "cash," "income." It seems reasonable to assume that if a New Jersey court were called upon to determine whether the assignment at bar were ineffective in view of the division of its subject-matter into broad *categories,* that court, being cited to *Fidelity Union Trust Co.* v. *Reeves, supra,* would come to the conclusion that New Jersey commerce would not be imperiled by applying to the assignment at bar that most fundamental, and least expendable, canon of judicial construction of written instruments, viz., that the intention of parties thereto is to be ascertained primarily, if not exclusively, from the words memorialized by them, and enforced as written.

Reason No. 3. The Court of Appeals has improvidently left undecided an important state question which would most probably have been resolved in your petitioner's favor by the state courts, viz., whether an assignment of assets not in actual or potential existence, for a valuable consideration, will be given effect and enforced in equity where such assets are subsequently brought into existence.

It has never been the law of New Jersey that an equitable assignment can arise only where the assignee has a specific res, or existing contract, to which the assignee can look for payment, or where the assignee secures the right to a particular fund in the hands of a third party. Ever since 1862, it has been held in New Jersey that "courts of equity support assignments, not only of choses in action, but of contingent interests and expectations, and also of things which have no present actual or potential existence, but rest in mere possibility only." *Smithurst* v. *Edmunds,* 14 N. J. Eq. 408, 416 (Ch. 1862). "The equitable title to a thing not in actual or potential existence may pass by as-

signment, the equity in the assignee attaching to the contemplated thing the instant it comes into being." *McFarland* v. *Stanton Manuf'g Co.*, 53 N. J. Eq. 649, 33 A. 962, 963 (E. & A. 1896). "Equity regards and treats as done what in good conscience ought to be done. * * * this great principle is likewise applicable to * * * assignments of future and contingent interests and possibilities therein when made upon a valuable consideration." *Martindell* v. *Fiduciary Council*, 133 N. J. Eq. 408, 30 A. 2d 281, 284, 285 (E. & A. 1943, per Mr. Justice Heher, a member of the present Supreme Court of New Jersey). See also *Bacon* v. *Bonham*, 33 N. J. Eq. 614, 616, 617 (E. & A. 1881), citing *Field* v. *Mayor of N. Y.*, 2 Seld. (6 N. Y.) 179, 185 to 187 (N. Y. Ct. of App. 1852); *Terney* v. *Wilson*, 45 N. J. Law, 282, 283, 284 (S. C. 1883); *Bigelow* v. *Old Dominion Copper, &c., Co.*, 74 N. J. Eq. 457, 490, 491 (Ch. 1908); *Fidelity Union Trust Co.* v. *Reeves, supra.*

The foregoing rules have been readily recognized and applied in federal courts. See *Union Trust Co.* v. *Bulkeley*, 150 F. 510 (6th Cir. 1907); *In re Macauley*, 158 F. 322 (D. C., E. D. Mich., 1907).

The receiver, in answer to this petition, may cite several New Jersey cases as incompatible with your petitioner's position. But they are not so. In *American Pin Co.* v. *Wright*, 60 N. J. Eq. 147, 46 A. 215 (Ch. 1900), affirmed 85 N. J. Eq. 219, 98 A. 1084 (E. & A. 1901), the agreement in suit was no more than a promise to pay out of a fund when received. There was no assignment, in terms, as here, of the future moneys; especially not an assignment, as here, expressly stated to be by way of security, and enforceable in equity as a lien upon such moneys when they came into being. In *Hauselt* v. *Harrison*, 105 U. S. 401, 405, this Court (1881) says:

> "We cannot agree with the Circuit Court in the construction, that the only security given to Hauselt by the contract was the personal promise of Bayer that

> he would perform it. To limit the contract to that extent is to deprive its last provision of all force; for, without it, the personal obligation * * * would still remain. *The clause providing for security must be held to mean something*; * * *."

In *Cogan* v. *Conover Mfg. Co.*, 69 N. J. Eq. 358, 60 A. 408 (Ch. 1905), reversed, 69 N. J. Eq. 809, 64 A. 973, 974 (E. & A. 1906), the court of last resort re-emphasized the distinction between an agreement couched or phrased as a mere promise to pay out of a future fund, and an assignment of such fund. Similarly, in *Myers* v. *Forest Hill Gardens*, 103 N. J. Eq. 1, 141 A. 808 (Ch. 1928), affirmed, 105 N. J. Eq. 584, 147 A. 911 (E. & A. 1929), the language of the agreement in suit was not that of an assignment.

The receiver, in answering this petition, will place his greatest reliance upon *Stokley Bros. & Co., Inc.* v. *Conklin*, 131 N. J. Eq. 552 (Ch. 1942). This case was considered by the Court of Appeals, which did not regard the decision as settling the law of New Jersey on the question at hand (A. 3a-4a).

It is true that, in the cited case, the Court of Chancery quoted from Restatement, Contracts, Par. 154(2), containing a proposition of law which seems to favor the receiver. But, upon careful study of the opinion in the *Stokley* case, *supra*, it will clearly appear that the Court of Chancery actually decided the case upon reasoning which accords completely with the views advanced by your petitioner in this case. That reasoning does not indicate such positive concurrence with the principle advanced in the Restatement, and such unmistakable departure from the previous pronouncements by the New Jersey courts of last resort, as to warrant the conclusion that the proposition announced in the Restatement represents the law in New Jersey on the subject. In the *Stokley* case, *supra*, the assignment was of all moneys to become due and owing to the assignor from

certain *future* severed crops. The principle applied by the court to that situation was stated, on page 151 of 26 A. 2d, as follows:

> "* * * the equitable title to the money, when earned, is vested in the assignee, subject, however, to existing equities and valid prior charges thereon."

The case was decided essentially upon the basis of *priority* as between the assignee and a crop mortgagee whose mortgage became a lien after the assignment but before the crops were severed. If the assignment had not been an otherwise enforceable one, there would have been no need to decide any question of priority between the assignment and the crop mortgage.

CONCLUSION

It is therefore respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory power of this Court.

LEWIS S. JACOBSON,
Petitioner,

By SAM WEISS,
Counsel for Petitioner.

September 19, 1955

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,542

HARRY C. STEIGMAN EQUIPMENT CO., INC.,
A CORPORATION OF NEW YORK,

v.

ATLANTIC HOTEL COMPANY, A CORPORATION OF NEW JERSEY,

LEWIS S. JACOBSON,
Claimant-Appellant.

ON APPEAL FROM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued May 6, 1955

Before GOODRICH and HASTIE, *Circuit Judges,* and MILLER, *District Judge.*

OPINION OF THE COURT

(Filed August 11, 1955)

By HASTIE, *Circuit Judge.*

The controversy arises in the course of the administration of an ordinary equity receivership of an insolvent New Jersey corporation, Atlantic Hotel Co., which was engaged

in the operation of the Brighton Hotel in Atlantic City, New Jersey. The company was ordered into receivership by the District Court for the District of New Jersey on the complaint of a creditor. Diversity of citizenship was the sole basis of federal jurisdiction.

The present appellant, Lewis Jacobson, is a creditor to whom Atlantic admittedly owes $11,500. Jacobson attempted to establish his entitlement to the priority of a secured creditor. However, neither the receiver nor the Master to whom the District Court referred the question of priority claims was persuaded. Thereafter, the District Court, agreeing with the Master, entered its order denying Jacobson's claim to status as a preferred creditor. It is from that order that Jacobson now appeals.

Atlantic Hotel Co. operated the Brighton Hotel on a long-term lease. During the winter 1951-52, Atlantic found its enterprise in such difficulty that it could not much longer finance day to day operations. Among other expedients, it borrowed $11,500 from Jacobson giving him its promissory note date February 13, 1952 and payable April 18, 1952 together with a second instrument dated February 13, 1952 called a "general assignment" which read in part as follows:

> ". . . Atlantic Hotel . . . do (sic) sell, grant, assign, convey, transfer, set over and deliver unto Lewis S. Jacobson, all its right, title and interest in and to all the proceeds, funds, collections, cash and all income of the Atlantic Hotel Co. from any nature and source whatsoever,
>
> ". . . hereby constituting and appointing Lewis S. Jacobson its true and lawful attorney irrevocable in its name, place and stead for the purposes aforesaid, to ask, demand, sue for, attach, levy, recover and receive all such sum and sums of money, which now are or may hereafter become due, owing and payable for, or on account of all or any of the accounts, dues, debts

and demands above assigned and hereby give to the said Lewis S. Jacobson, his heirs, executors, administrators and assigns full power and authority for his or their own use and at his or their cost, . . .

"The assignment is given to secure payment of $11,500, as evidenced by a promissory note of even date herewith, to secure all past and present indebtedness and unpaid balances and present loans."

Business continued from bad to worse. Jacobson was not paid. Nothing was done with reference to or on the basis of the "general assignment" until Atlantic's operation was terminated by the present receivership on September 5, 1952. The receiver found that Atlantic had only about $300 in cash and little stock of value. It had been reduced to dealing with suppliers from day to day on a c.o.d. basis. The only substantial fund thereafter realized by the receiver came from a sale of such capital assets as remained to Atlantic. This property consisted of the unexpired term of the lease and rights incidental thereto, furniture and other personal property used in the hotel operation and a liquor license. With the court's approval, these items were sold for $65,000. The specific question now is whether the "general assignment" enables Jacobson to claim more than a general creditor's rights with respect to this fund.

In the view of the District Court the law of New Jersey would not recognize the "assignment" to Jacobson as creating any equitable lien on the fund now in the receiver's hands because that fund came into existence after the assignment and was not the product of any contract or obligation existing at the time of the assignment. Paragraph 154 (2) of Contracts Restatement lends support to this position and, in dictum at least, the Court of Chancery of New Jersey has indicated approval of that section. See *Stokely Bros. & Co. v. Conklin*, 1942, 131 N.J. Eq. 552, 559-60, 26 A.2d 147, 151. *Cf. Cogan* v. *Conover Mfg. Co.*, 1906,

69 N.J. Eq. 809, 64 A. 973. But in our judgment the New Jersey case law on this point is indecisive. It also seems unsettled whether as a matter of commercial policy, New Jersey would regard the instrument here in suit as ineffective because of its extreme generality. *Cf. Fidelity Union Trust Co. v. Reeves,* 1924, 96 N.J.Eq. 490, 125 A. 582; *affirmed,* 1925, 98 N.J.Eq. 412, 129 A. 922.

In any event, these are important questions of commercial law and creditors rights in New Jersey to which we find no clear answer. We prefer not to anticipate state decision of these questions. And in this case we think the judgment of the District Court is supportable on a ground which avoids these general questions of New Jersey law.

Specifically, it is our conclusion that a proper construction of the "assignment" of February 13, 1952 makes it inapplicable to the fund now in the hands of the receiver. The instrument as set out above purports to give Jacobson a security interest in "all the proceeds, funds, collections, cash and all income of the Atlantic Hotel Co." And, the next paragraph authorizes Jacobson to take whatever steps may be appropriate to reduce to possession "any of the accounts, dues, debts and demands above assigned."

This language was used in a situation where Atlantic was conducting an income producing business and money was being loaned by Jacobson for use in that business. Both the language used and the circumstances of its employment indicate that the parties were attempting to give Jacobson some security interest in present and prospective receipts and accounts receivable of the business as operated by Atlantic. The language is not apt to describe real or personal property constituting capital assets employed in the business. Nor is it apt to describe money which may subsequently be realized by the conversion of such assets into cash on the liquidation of the business. Nor is it apt to cover later operations of a receiver. We conclude, therefore, that as a matter of construction of language the fund now in question is not covered by the instrument of Febru-

ary 13, 1952. It is not necessary to decide whether Jacobson would have had a lien upon income realized by Atlantic before the receiver took over Atlantic's property and business.

The judgment will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,542

HARRY C. STEIGMAN EQUIPMENT CO., INC.,
A CORPORATION OF NEW YORK

vs.

ATLANTIC HOTEL COMPANY, A CORPORATION OF NEW JERSEY

LEWIS S. JACOBSON,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GOODRICH and HASTIE, *Circuit Judges,* and MILLER, *District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

August 11, 1955

Attest:

HARRIET G. HUMPHRYS
Deputy Clerk

RECEIVED & FILED
AUG 11 1955
IDA O. CRESKOFF
Clerk

Respondent contends the Petition herein should be denied on the following grounds:

1. The decision reached by the Court of Appeals is not of the nature contemplated by Rule 19 of this Court.

2. The Court of Appeals did not err in its construction of the assignment.

ARGUMENT.

Reason No. 1. The decision reached by the Court of Appeals did not resolve an important state question in the sense implied by the petitioner. The determination of the question whether the assignment of "all the proceeds, funds, collections, cash and all income of the Atlantic Hotel Co. from any nature and source whatever" covered money realized by the receiver through liquidation of assets was, in this case, merely the exercise by the Court of the normal function of construing the language of a written contract. The issue resolved was not, "*Could* such assignment, *under state law,* reach such after-acquired assets in the hands of a receiver?" Rather it was: "Does the language of the assignment indicate that it was intended to cover such after-acquired assets?" The petitioner's contention that the Court of Appeals has resolved an important state question is addressed to the former; whereas, the latter issue was very evidently that which the Court of Appeals intended to, and did, decide.

It is clear that the Court of Appeals eschewed any notion that it was deciding a theretofore undetermined state question. Thus, in the opinion, we find (A. 4a):

> "We prefer not to anticipate state decision of these questions. And in this case we think the judgment of the District Court is supportable on a ground which avoids these general questions of New Jersey law."

And it is manifest that the petitioner is fully aware of the distinction to be observed in what the Court decided, as opposed to what it refrained from deciding. Thus we find the following acknowledgment in petitioner's argument (P. 7):

> "* * *, if the Court of Appeals was correct in its construction of the assignment in the last paragraph above quoted, it properly refused to determine the otherwise unavoidable questions of whether the assignment was ineffective by reason of its extreme generality and whether the assignment would, in equity, attach to the proceeds of the sale by the receiver of the capital assets of Atlantic."

Further, petitioner acknowledges that the Court of Appeals was warranted in resolving the question of construction without reference to any decision of the state court. Of this the petitioner says (P. 7):

> "This does not necessarily constitute error on the part of the Court of Appeals, * * *."

It follows that, as his Reason No. 1, petitioner neither recites an instance where the Court of Appeals has (a) decided an important state question not theretofore determined by the state's courts, nor (b) reached a decision in conflict with applicable state law. Instead, petitioner's Reason No. 1 reduces to the proposition posed by the petitioner himself (P. 8):

"* * * that the Court of Appeals was in error in its construction of the applicability of the assignment."

Although respondent is aware that this Court's supervisory power is not circumscribed by its Rule 19; whatever limitation the taxonomy of that Rule intends must bear heavily against petitioner's request for review. That this Court, the court of the State of New Jersey, or any other tribunal, might have decided the question of construction other than as it was decided by the Court of Appeals does not, standing alone, appear to suffice as cause for allowance of a writ.

Reason No. 2. Assuming that, aside from the limitations suggested by Rule 19, this Court would be concerned to exercise its supervisory power where the insistence is that there was error in construction of the language employed by contracting parties, respondent rejoins that such a situation is not here presented. The Court of Appeals characterized the language of the instrument as follows (A. 4a):

"This language was used in a situation where Atlantic was conducting an income producing business and money was being loaned by Jacobson for use in that business. Both the language used and the circumstances of its employment indicate that the parties were attempting to give Jacobson some security interest in present and prospective receipts and accounts receivable of the business as operated by Atlantic. The language is not apt to describe real or personal property constituting capital assets employed in the business. Nor is it apt to describe money which may subsequently be realized by the conversion of such assets into cash on the liquidation of the business. Nor is it apt to cover later operations of a receiver. We conclude,

> therefore, that as a matter of construction of language the fund now in question is not covered by the instrument of February 13, 1952."

Petitioner urges that the broad terminology used in the instrument suffices to cause the assignment to embrace proceeds of a sale by the receiver of Atlantic's capital assets. The words "from any nature and source whatever" are stressed as having exceptional significance and, as authority therefor, reference is made (P. 8) to *Bergman v. Buechler*, 249 App. Div. 553, 292 N. Y. S. 882, 884 (1937). In that case the Court was construing the meaning of the word "income," not in its general application, but as the same was employed in the text of a statute. Thus, the Court observed:

> "The law designed to compel payment of judgments by debtors who are in a position to do so, provides an additional and more adequate remedy than that which heretofore existed for the enforcement of judgments by judgment creditors. In our opinion, contributions, though in the nature of gratuities donated by relatives, when and if received by the debtors, constitute income *as defined by this particular statute.*" (Italics supplied.)

Petitioner contends that special definitional significance attaches to the particular words employed in the instrument. Thus, he implies that, upon the authority of the decision in *Mortgage Loan Co. v. Livingston*, 45 F. 2d 28, 32, use of the word "collections", makes the assignment applicable to funds coming into the hands of the receiver (P. 9). It does not appear that the Court's decision in that case was concerned with a definition of that word. In its opinion the Court merely gave expression to the effect of the application of established principles of receivership law.

Nothing in the decision suggests the interpretation to be placed upon an assignment which includes in its verbiage, among others, the word "collections".

Petitioner also cites the decision in *Stanton v. Metropolitan Lumber Co.*, 107 N. J. Eq. 345, 152 A. 653 (Ch. 1930) (P. 9). In that case, it is submitted, the Court was chiefly concerned with the question whether a mortgagee under a mortgage which contained a specific assignment of rents, to take effect upon default, could claim such rents from a receiver even though such mortgagee had not entered into possession. The specificity of such an assignment permits much less room for construction than was the case in respect of the assignment which the Court of Appeals construed in the instant case. To borrow a word from the opinion in this matter, the language of the assignment in the *Stanton* case was entirely "apt" to describe the rents accruing, after default by the mortgagor, and to be collected either by the mortgagee as a rent receiver, or by the individual appointed as receiver of the mortgagor, an insolvent corporation.

In *Hurley v. Atchison, Topeka & Santa Fe Ry.*, 213 U. S. 126 (1908), also cited by petitioner (P. 9), an entirely unrelated situation obtained. There the railroad company, to assure a continued supply of coal, entered into a contract with a mining company whereby the coal was to be delivered daily and paid for on the fifteenth of the month, following. The mining company became financially embarrassed and to provide against interruption of supply the railroad company advanced money to the mining company against future deliveries of coal. Eventually the mining company went into bankruptcy and at the time the railroad company had a credit balance on its advances. The issue before the Court was simply whether the amount of such credit balance was to be considered as payment in advance on coal to be delivered or whether it was to be con-

sidered in the nature of a loan to the mining company. Concerning this the Court said (at P. 134):

> "That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day as required, does not change the transaction into one of an ordinary individual loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal as mined should be delivered and is from an equitable standpoint to be considered as a pledge of the unmined coal to the extent of the advancement."

It is submitted, therefore, that the petitioner has not revealed any authoritative support for his proposition that the Court of Appeals was in error in its construction of the applicability of the assignment. Absent such a showing, the petitioner's Reason No. 1, as earlier suggested herein, cannot be relied upon for allowance of the writ sought.

In reference to petitioner's Reasons No. 2 and No. 3, it is urged merely that such reasons do not harmonize with any suggested in Rule 19. The Court of Appeals admittedly left the two recited questions undecided (A. 4a). However, it cannot be said that had the questions been disposed of by the Court of Appeals, they would have been decided favorably to petitioner because such would have been the *probable* disposition thereof by the state court. Instead, the Court of Appeals found the New Jersey case law on these points to be indecisive and unsettled. None of the authorities presented by petitioner under Reasons Nos. 2 and 3 can be said to indicate that the Court of Appeals did not correctly characterize the state of the local law.

CONCLUSION.

It is therefore respectfully urged that there has not been shown, in the petition herein presented, a proper occasion for the exercise of the supervisory power of this Court.

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